

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
AT NASHVILLE

STEPHEN TOD NEWBERRY,  
CAROLYN JONES,  
CAROL SMITH,  
MARY ANN WILSON,  
MARVIN RAY BERRY,  
CHRISTOPHER JACKSON by his mother,  
Wanda Jackson, acting as next friend,  
Individually and on behalf of all others  
similarly situated,

Plaintiffs

Class Action

Civil Action No: 3-98-1127  
Judge Echols  
Magistrate Brown

- VS. -

M. D. GOETZ, JR., in his official capacity as the  
Tennessee Commissioner of Finance and  
Administration,

Defendants,  
and

TENNESSEE HEALTH CARE ASSOCIATION,

Defendant-Intervenor.

**AGREED ORDER**

This class action, asserting claims under the Medicaid Act and the Americans with Disabilities Act (ADA), challenged certain policies and practices relating to the provision of home health services to enrollees in Tennessee's Medicaid waiver program known as TennCare. The plaintiffs, representing a class certified to consist of "all present or future TennCare beneficiaries for whom home health services are, or will be, medically necessary" and a subclass of TennCare enrollees with ADA-defined disabilities, contended that the defendant permitted the managed care organizations (MCOs) that participate in the TennCare program to wrongfully

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Rule 58 and/or Rule 79(a).  
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deny enrollees medically necessary home health services, In addition, plaintiffs challenged a proposed annual 125-visit limit on home health care benefits and a new co-payment requirement for those services. Plaintiffs sought prospective injunctive and declaratory relief with regard to each of their claims,

Pending before the Court is the application of the plaintiffs and the defendant state official for approval of an agreed order settling all claims raised in the Restated Complaint filed December 20, 2003. (Doc. No. 262 ). In its order of September 5, 2003, the Court preliminarily approved the agreement and authorized the publication of notice to the plaintiff class. (Doc. 329)

At a fairness hearing held on October 6, 2003, the Court considered exhibits submitted by the parties, the statements of counsel for the original parties and defendant-intervenor, and the record as a whole. The procedural prerequisites for approval of a class action settlement have been met, Rule 23(e), F.R.C.P, *Williams v. Vukovich*, 720 F.2d 909 (6<sup>th</sup> Cir. 1983). The present agreement is the product of good faith, arms-length negotiations, is not illegal, and is reasonable. *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 546 (6<sup>th</sup> Cir. 1982) *revd. on other grds. sub mm. Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Aro Corp. v. Allied Witan Co.*, 531 F. 2d 1368, 1372 (6<sup>th</sup> Cir. 1976), *cert. den.* 429 U.S. 862 (1976). The Court concludes that the following agreed order is "fair, adequate and reasonable", in light of its "fairness ... to those affected, the adequacy of the settlement to the class, and the public interest", and that it should be approved, *Williams v. Vukovich*, *supra*. TZO F.2d at 921; *Tenn. Assoc. of Health Maintenance Organizations, Inc. v. Grier*, 262 F.3d 559 (6th Cir. 2001)

It is, therefore, ORDERED as follows:

1. The defendant has not implemented and has withdrawn the proposed reduction of home health care benefits, the proposed elimination of private duty nursing benefits, and the imposition of increased co-payments for home health care, and such benefits shall remain part of the TermCare program, subject to paragraph 2.

^A trade association representing Tennessee's nursing home industry, the Tennessee Health Care Association (THCA), was permitted to intervene as a defendant, (Doc. No. 77).

2. The defendant's withdrawal of the benefits reductions and cost-sharing increases referred to in the preceding paragraph is without prejudice to his right to seek to implement those or similar benefits reductions or cost-sharing increases at some future date. Defendant will provide the other parties' counsel with 45 days notice of any such proposed changes. Similarly, this agreement does not prejudice plaintiffs' right, if any such right exists, to oppose on any grounds available to them under the law any effort by the defendant to impose benefits reductions or cost-sharing increases in the future, nor does it prejudice the plaintiffs' right, if any such right exists, to seek any relief available to them under the law with respect to such changes,

3. The defendant shall assure the provision of medically necessary home health care, as defined by 42 C.F.R. §440.70, to members of the plaintiff class. The defendant shall implement and maintain a monitoring process that ensures compliance with this requirement, including ensuring that medically necessary home health care within the meaning of 42 C.F.R. §440.70 is not denied on any of the following grounds:

- a. because such services are medically necessary on a long term basis or are required for the treatment of a chronic condition;
- b. because such services are deemed to be custodial care;
- c. because the patient is not homebound;
- d. because private insurance utilization guidelines, including but not limited to those published by Milliman & Robertson or developed in-house by TennCare managed care contractors, do not authorize such health care as referenced above;
- e. because the patient does not meet coverage criteria for Medicare or some other health insurance program, other than TemiCare;
- f. because the home health care that is needed does not require or involve a skilled nursing service;
- g. because the care that is required involves assistance with activities of daily living;

- h. because the home health service that is needed involves home health aide services;
- i. because of a numerical limit unrelated to medical necessity;
- j. because the plaintiff class member meets the criteria for receiving Medicaid nursing facility services; or
- k. on the grounds that such medically necessary home health care is not a covered service,

Nothing herein shall obligate the defendant to provide services that are not medically necessary or that do not meet the federal definition of home health care, nor modify the rights reserved to the parties by paragraph (2), above. Nothing herein shall obligate the defendant to provide services to a person who is not eligible for, and enrolled in, TermCare at the time that services are sought.

4. The defendant shall, within 90 days of the entry of this order and at least once annually thereafter for a period of no more than three years, notify all TennCare providers and enrollees of the terms of TennCare home health coverage as governed by this order. Notices to enrollees shall be readable at a sixth grade level of proficiency, as measured by the Flesch-ICincaid scale or other recognized readability instrument.

5. The plaintiffs' counsel may, as reasonably necessary to monitor the state defendant's compliance with this order, inspect and request copies of documents and examine electronic records in a hard copy form. Such review of documents and records must be conducted in such a manner as not to interfere unreasonably in the normal operation of defendant's business. The right of review of documents established by this paragraph shall be limited to those documents relevant to defendant's compliance with his obligations under this order, and the use of any information obtained by the plaintiffs in the course of such review shall be strictly limited to monitoring and enforcement of the provisions of this order. Plaintiffs' counsel shall maintain the confidentiality of class members' TennCare and medical records. Nothing in this paragraph shall be construed to confer any right to plaintiffs to inspect the operation of any MCO or intervenor,

nor shall it either limit or enhance any rights the plaintiffs may have to inspect or otherwise obtain information from an MCO or intervenor under any other legal authority.

*Exclusions and Reservations*

6. This order shall not affect the right of any individual class member to seek any and all relief that is otherwise available through administrative review or proceedings against the state before the Tennessee Claims Commission based upon alleged actions or omissions of the state defendant, or through litigation authorized by other state or federal law. It is intended to adjudicate with respect to the class and its individual members only those claims for relief which were made on their behalf in the Restated Complaint in this case, and to thus bar further proceedings by class members seeking the same relief under 42 USC §§1983 and 12133, Plaintiffs specifically acknowledge that any action by or on behalf of the plaintiff class or any individual class member in the nature of a contempt or enforcement proceeding shall be brought only in this litigation. This order shall not preclude any claims for relief under 42 U.S.C. §12133 other than those related to the delivery of home health care, as defined by 42 C.F.R. § 440.70, or private duty nursing benefits under the TemiCare program. This order does not foreclose the plaintiffs from asserting in this or another action any claims for relief under the Americans with Disabilities Act that may be available to them, in the event that the defendant changes the TennCare home health or private duty nursing benefits. The parties acknowledge the state may assert any and all defenses available in any such administrative, Claims Commission, or other litigation.

7. The plaintiffs will not initiate contempt proceedings to enforce the terms of this order without having first made a good faith effort to apprise the defendant of any concerns regarding noncompliance, The defendant will not move to vacate this order pursuant to paragraph 10 without first making a good faith effort to reach agreement with the plaintiffs regarding such relief. Any motion seeking further relief, whether by vacation, modification or enforcement of this order, shall be accompanied by a certificate of counsel attesting that a good

faith effort has been made to resolve, through negotiation, the issues which are the subject of the motion, and shall describe such effort,

*Class Action Provisions*

8. Pursuant to Rule 23 (c) - (e), Federal Rules of Civil Procedure, the Court determines that the plaintiff class bound by the terms of this order consists of "all present or future TennCare beneficiaries for whom home health services are, or will be, medically necessary", and includes a subclass who are persons with disabilities,

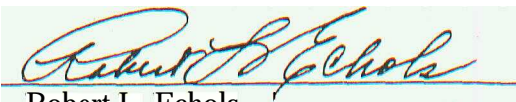
*Attorneys' Fees and Expenses*

9. The defendant shall pay plaintiffs' reasonable attorney fees as permitted under 42 U.S.C, §1988. The plaintiffs shall submit their application for a fee award for legal services rendered to date within 45 days of the entry of this order.

*Expiration of Order and Dismissal of Case*

10. At any time after three (3) years from the entry of this order the defendant may seek dismissal of this case upon proof that defendant has implemented the terms of the order and is in current, substantial compliance with the requirements herein. In any event, this order will expire in five (5) years from the date of this order, without prejudice to the plaintiffs' right to institute further proceedings.

**IT IS SO ORDERED** this \_\_ ^ " d a y of October, 2003.

  
Robert L. Echols  
Chief United States District Judge

Approved for entry:

TENNESSEE JUSTICE CENTER

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